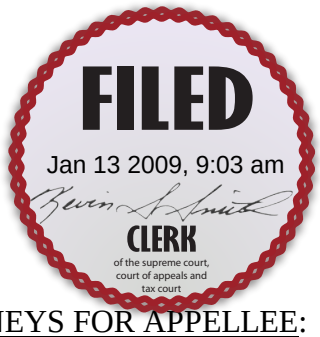

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IN THE
COURT OF APPEALS OF INDIANA

IAN McCULLOUGH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0805-CR-411
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0602-FA-36340

January 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Ian McCullough appeals his conviction of three counts of child molesting, two as class A felonies and one as a class C felony. We affirm.

Issues

McCullough present four issues, which we restate as follows:

I. Whether the trial court properly denied McCullough's motion for discharge;

II. Whether the trial court properly admitted, under the Protected Person Statute, the statement made by the victim to a child forensic investigator;

III. Whether the trial court committed fundamental error when it instructed the jury that evidence of the slightest penetration is sufficient to sustain a conviction for child molesting; and

IV. Whether, during rebuttal, the prosecutor's use of the word "walk" to indicate acquittal constituted reversible misconduct.

Facts and Procedural History

The facts most favorable to the conviction are that L.D. (DOB 1/22/98) is the daughter of Sarah Calvert and Jason Dees. When L.D. was approximately one year old, Calvert began dating McCullough, and eventually moved in with him. Tr. at 41. During the next few years, the couple had two children together, E.M. (DOB 5/14/2000) and M.M. (DOB 6/4/2002). *Id*. at 40-41. However, in 2003 or 2004, the couple separated. *Id*. at 602. Thereafter, L.D. lived with her mother, Calvert, in Greenfield, while E.M. and M.M. lived with their father, McCullough, in Indianapolis. On weekends, L.D. would visit with McCullough, whom she referred to as "daddy," and her half-sisters. *Id*. at 561. When she stayed overnight at

McCullough's home, L.D. slept in bed with him or in a different room with E.M. and M.M. *Id*. at 563, 722-23.

At some time before L.D. entered pre-school, McCullough touched her vagina with his fingers. *Id.* at 564. McCullough touched L.D. inappropriately more than once over the next few years. *Id.* Twice he touched her vagina with his tongue while they were in his bed at his home. *Id*. Another time, McCullough touched L.D.'s vagina with his finger while she sat in the seat next to him in his vehicle. *Id*. at 570. In the fall 2005, McCullough inserted his finger in L.D.'s vagina. *Id*. at 565. McCullough referred to his actions as a "tickle" and instructed L.D. not to tell anyone lest he get in trouble. *Id*. at 571-72.

In early December 2005, Judy Calvert ("Judy"), L.D.'s maternal grandmother, with whom she was living at the time, said that L.D. would be visiting with McCullough for the weekend. L.D. became upset, and questioned if she had to go. *Id*. at 604. Moved by L.D.'s tears and pleading, Judy told her she did not have to go but asked why L.D. was reluctant. *Id.* at 605. L.D. replied that she had been masturbating, that she had taught E.M. how to do it, and that she worried that it was wrong. Exh. at 40. When Judy attempted to assure L.D. that her behavior was not bad per se, L.D. inquired whether it was okay for McCullough to be touching her private parts. *Id*. Shaking and crying, L.D. confided in her grandmother that McCullough would stop if L.D. asked him to; L.D. made Judy promise not to tell anyone else. *Id*.; Tr. at 605-06.

Upon Calvert's return home, Judy immediately shared L.D.'s statements with her, and they took L.D. to Riley Children's Hospital that same night. Tr. at 116, 140, 575. Riley

employees and/or Calvert reported the allegations to Child Protective Services ("CPS"). App. at 194; Tr. at 644. In early February 2006, Hancock County CPS worker Tiffany Mitchell interviewed L.D., who recounted the molestations. App. at 31. Marion County CPS caseworker Lucinda Pope became involved and asked forensic child interviewer Diane Bowers of the Child Advocacy Center to meet with L.D. Tr. at 644; App. at 196. On February 13, 2006, Bowers performed a videotaped interview of L.D. during which L.D. used anatomical drawings and her own hands to help explain what had occurred with McCullough.

Thereafter, the case was assigned to Indiana Police Detective Jan Faber. Tr. at 653. By the end of February 2006, the State filed an information charging McCullough with three counts of child molest, two as deviate sexual conduct (class A felonies) and one as fondling (class C felony). Ind. Code § 35-42-4-3. On December 18, 2007, at the conclusion of a two-day trial, a jury convicted McCullough as charged. In March 2008, the court sentenced McCullough to a twenty-year aggregate term of imprisonment. App. at 442. Specifically, he received thirty years with ten suspended for each of the class A felonies, and four years for the class C felony, all to be served concurrently. *Id*.

We supply additional facts where necessary.

Discussion and Decision

I. Motion for Discharge

In a March 12, 2008 order denying McCullough's December 7, 2007 Criminal Rule 4

motion for dismissal,[1] the court noted that the defense did not ask for a specific ruling on the motion prior to trial, and that the attorney who had made the dismissal request had been replaced by new counsel. App. at 452. In charting the delays in McCullough's case by date, number of days, and reasons therefor, the court ultimately determined that 144 days were chargeable to the State. *Id*. at 452-53. It further noted:

> [T]he continuances which [McCullough] sought to have charged to the state for failure to provide CPS documents were rejected for two reasons: (1) as noted, the defense had its own reasons for continuances apart from the CPS and other discovery issues (2) the CPS issues were largely manufactured by the defense. [McCullough] claimed to have made a statement to CPS officials which was recorded. On the basis of that representation, the Court was generous in granting continuances to both sides because the Court believed that such a statement, if it existed, could be important to both sides and the pursuit of justice. However, when the Court conducted contempt-related proceedings, the defense conceded that no such formal statement occurred and [McCullough] merely had a brief conversation of little [] consequence with CPS workers.

Id. at 453.

McCullough asserts that the court abused its discretion in denying his motion for discharge because "all but 87 days of the 654-day delay in [his] trial was caused by the State's failure to timely obtain and provide discovery." Appellant's Br. at 11. Citing Criminal Rule 4(C), McCullough contends that various communication breakdowns between

---

[1] McCullough claims he filed a motion for discharge on June 6, 2007. App. at 496a. Oddly, the CCS contains no entry memorializing this discharge motion, nor could McCullough's counsel locate the motion. *Id*. at 496a-496b. Yet, in a September 28, 2007 order setting a scheduling and discovery conference, the court referenced a June 6 defense motion for discharge "based, in part, on the State's failure to produce the CPS records." App. at 496L-496P. However, without a copy of the motion, any ruling thereon, let alone any indication of a challenge to whatever ruling may have occurred, we are at a loss to determine how such a motion affects the Criminal Rule 4(C) analysis. We do know that as of April 10, 2007, McCullough agreed to resetting the trial date to June 18, 2007.

the prosecution and its witness and other state agencies caused the majority of the continuances, and forced McCullough to choose between his right to a timely trial and his right to a fair trial.

The Sixth Amendment to the United States Constitution and Article 1, Section 12 of the Indiana Constitution guarantee the right to a speedy trial. *Clark v. State*, 659 N.E.2d 548, 551 (Ind. 1995). The provisions of Criminal Rule 4 help implement this right by establishing time deadlines by which trials must be held. *See id*. at 550. Criminal Rule 4(C) provides in relevant part:

> Defendant Discharged. No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; *except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period of congestion of the court calendar.*

(Emphasis added).

Thus, the rule places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested, but allows for extensions of that time for various reasons. *Ritchison v. State*, 708 N.E.2d 604, 606 (Ind. Ct. App. 1999), *trans. denied*. The defendant is under no obligation to remind the State of its duty. *Rhoton v. State*, 575 N.E.2d 1006, 1010 (Ind. Ct. App. 1991), *trans. denied*. However, a defendant has a duty to *alert the court* when a trial date has been scheduled beyond the one-year limit set forth in the rule. *Id*. (citing *Huffman v. State*, 502 N.E.2d 906 (Ind. 1987)). If a defendant remains silent while the court schedules a trial beyond the allowable date, then his action estops him from

enforcing any right of discharge. *Id*. (citing *Utterback v. State*, 261 Ind. 685, 310 N.E.2d 552 (1974)). Indeed, if a defendant acquiesces in a delay that results in a later trial date, or if a delay is caused by the defendant's own motion or action, the one-year time limit is extended accordingly. *Vermillion v. State*, 719 N.E.2d 1201, 1204 (Ind. 1999); *Wooley v. State*, 716 N.E.2d 919, 924 (Ind. 1999); *Cook v. State*, 810 N.E.2d 1064, 1066-67 (Ind. 2004) (noting that time for trial is extended for delays caused by the defendant's own acts or continuances had on the defendant's motion); *Frisbie v. State*, 687 N.E.2d 1215, 1217 (Ind. Ct. App. 1997), *trans. denied*. We review a trial court's ruling on a Rule 4 motion for discharge for an abuse of discretion. *Smith v. State*, 802 N.E.2d 948, 951 (Ind. Ct. App. 2004).

Although the State filed the three molest charges on March 2, 2006, apparently McCullough was not arrested until the following day. Therefore, the one-year Criminal Rule 4(C) period began on March 3, 2006. *See Sweeney v. State*, 704 N.E.2d 86, 100 (Ind. 1998) ("The one year period begins with the date criminal charges are filed against the defendant or with the arrest of defendant, whichever is later."). As of Saturday, March 3, 2007, jury trial dates had been vacated several times for a variety of reasons, without objection from McCullough. *See* App. at 7, 8, 10, 11, 12, 13.

On March 5, 2007, McCullough filed a motion for continuance. *Id.* at 14. The court granted the continuance, "vacated jury trial on 3/26/07," and set a jury trial date of April 9, 2007. *Id*. McCullough did not object to the setting of a jury trial date that was outside the one-year period. Having failed to alert the court or file a timely objection when it set a trial date beyond the Criminal Rule 4(C) timeframe, McCullough arguably waived his right to

discharge. *See Wheeler v. State*, 662 N.E.2d 192, 194 (Ind. Ct. App. 1996); *Hood v. State*, 561 N.E.2d 494, 496 (Ind. 1990) (holding that failure "to object at the earliest opportunity" to a trial date which is beyond the time period allowed waives the issue).

Waiver notwithstanding, we are unmoved by McCullough's argument that the delays in his case were almost entirely the State's fault. McCullough asked for or acquiesced to *nine* continuances. In these instances, the trial court determined that McCullough was the sole or joint driving force in seeking additional time to be ready for trial. In justifying the continuance requests, the following reasons were offered: "Defense wants to hire an expert witness," "Defendant wants to conduct depositions and has not supplied complete discovery," "expert witness unavailable for trial," "(joint) to seek CPS documents," "attend CLE conference," "[defense] expert's report unfinished," "[defense] investigator unavailable." App. at 452-53.

This was not a case of "blatant and well-documented" failures to respond to discovery requests. *See Cole v. State*, 780 N.E.2d 394, 397 (Ind. Ct. App. 2002), *trans. denied*. Rather, this was a situation where the State was faced with a witness, Calvert, who would not appear for deposition due to hospitalization and issues beyond the State's control. Tr. at 153, 161-64. As for the CPS records that *the State* considered using for its case, they were provided to defense counsel. When McCullough requested additional CPS records, CPS again provided what it believed McCullough was seeking, though it did take time. CPS never did make available a recording, video or otherwise, of a February 2006 conversation between McCullough and a CPS worker, *because no recording existed*. *Id.* at 280-83.

In summary, by the time McCullough's case went to trial, twenty-two months had elapsed since charges had been filed. Our examination of the facts and circumstances during that time period reveals that, contrary to McCullough's characterization, he either caused or acquiesced to the vast majority of the delay. Indeed, even giving the benefit of the doubt to McCullough regarding certain continuances, the State still brought him to trial well within the Criminal Rule 4(C) timeframe.[2] Accordingly, the court did not abuse its discretion in denying the motion for discharge.

II. Admission of Evidence

McCullough argues that the court abused its discretion in finding certain uncorroborated out-of-court statements sufficiently reliable to justify their admission under the Protected Person Statute. *See* Ind. Code § 35-37-4-6. Specifically, L.D. made statements about the incidents approximately four to six months after they occurred. The court allowed the jury to view a videotape of L.D. recounting the events and permitted additional hearsay statements at trial. McCullough asserts that the intervening time between the molestations and the statements "provided too much opportunity for suggestion, implanting and cleansing[.]" Appellant's Br. at 10. He insists that L.D. had motives to fabricate and that her story grew over time.

Whether to admit evidence is within the sound discretion of the trial court, and we will not reverse a decision to admit evidence absent a manifest abuse of that discretion.

[2] Specifically, even charging the State with seventy-three days from arrest through initial trial date, forty-two days for a joint continuance seeking CPS documents, seventy days seeking CPS documents (though also partly due to McCullough's expert's unfinished report), and eighty-four days when CPS supplied additional discovery, the State would still have had ninety-six of the 365 days left.

Goldsberry v. State, 821 N.E.2d 447, 453-54 (Ind. Ct. App. 2005). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id*. at 454. In reviewing the trial court's decision, we will consider only the evidence in favor of the ruling and any unrefuted evidence in the defendant's favor. *Id*.

The purpose of enacting the Protected Person Statute, an exception to the general rule against the admission of hearsay, is twofold: it preserves the confrontation rights of the accused while simultaneously reducing the trauma for child victims in sexual abuse cases. *Howard v. State*, 853 N.E.2d 461, 466 (Ind. 2006). The relevant portions of the statute follow:

> (d) A statement or videotape that:
> (1) is made by a person who at the time of trial is a protected person[3];
> (2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and
> (3) is not otherwise admissible in evidence;
> is admissible in evidence in a criminal action for an offense listed in subsection (a) or (b) if the requirements of subsection (e) are met.
>
> (e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:
> (1) The court finds, in a hearing:
> (A) conducted outside the presence of the jury; and
> (B) attended by the protected person;
> that the time, content, and circumstances of the statement or videotape provided sufficient indications of reliability.
> (2) The protected person;
> (A) testifies at the trial; or

[3] It is undisputed that L.D. is a protected person because she is less than fourteen years of age. *See* Ind. Code § 35-37-4-6(c)(1).

(B) is found by the court to be unavailable as a witness ...

Ind. Code § 35-37-4-6. Considerations in making the reliability determination under the statute include: (1) the time and circumstances of the statement, (2) whether there was significant opportunity for coaching, (3) the nature of the questioning, (4) whether there was a motive to fabricate, (5) the use of age-appropriate terminology, and (6) spontaneity and repetition. *Agilera v. State*, 862 N.E.2d 298, 306 (Ind. Ct. App. 2007), *trans. denied*.

L.D. first disclosed the molestations in early December 2005. While crying and requesting not to visit McCullough overnight, L.D. asked her grandmother if it was okay for McCullough to touch her privates. Her stunned grandmother replied it was not, asked if he had ever used his penis, reassured L.D. that she had done nothing wrong, and indicated she would be protected from such actions in the future. Tr. at 138. That same day, Calvert and Judy took L.D. to Riley.

Initially, child services in Hancock County became involved, and a caseworker spoke with L.D. at the Greenfield Police Department in early February. According to the affidavit for probable cause, L.D. recounted that McCullough had touched her "you know what" with his hand and tongue a lot at his Marion County home, had touched her in his vehicle, had gotten on top of her and moved back and forth when they lived in California, and had instructed her not to tell anyone. App. at 31. L.D. stated that the last incident had happened before Halloween in 2005 when she was seven years old.

When authorities learned that the alleged crimes had occurred in Indianapolis, the case was moved to Marion County. Accordingly, on February 13, 2006, Bowers interviewed

L.D., who by then was eight years old. In response to Bowers' open-ended questions, L.D. reiterated a very consistent story to what she had told the Hancock County interviewer. L.D. described the various instances of molestation, using age-appropriate language and her hands to describe and show what McCullough had done. She also confirmed that the last time McCullough had touched her was in the fall 2005. No evidence of coaching was presented.

Almost two years after the molestation allegations first came to light, L.D. was a witness at McCullough's trial. On direct and during cross-examination, L.D. testified consistently regarding the instances of molestation. When asked, L.D. denied being mad at McCullough, him being mad at her, or her otherwise being in trouble on the day she first disclosed the molestation to her grandmother. Tr. at 594, 573. She also responded that Calvert had not told her what to say on the way to speak with Bowers. *Id*. at 575. Indeed, with the exception of reassuring L.D. that she had done nothing wrong, neither Calvert nor Judy had spoken very much about the incidents to L.D. since the allegations had surfaced. *Id*. at 52, 118, 140, 575.

In reviewing the facts relevant to an analysis under the Protected Person Statute, we acknowledge that time is an important consideration. Yet, the focus should not be on time in and of itself, but on time as it relates to spontaneity and likelihood of suggestion. And, we must recall that time is one of several factors in the calculation performed in each individual case. *See Taylor v. State*, 841 N.E.2d 631, 636 (Ind. Ct. App. 2006), *trans. denied*.

Here, there is no evidence that L.D.'s original statement to her grandmother was solicited by anyone or prompted by improper motives. L.D. did provide more details when

she spoke with CPS interviewers than she did when she first asked her grandmother if it was okay for McCullough to touch her privates. However, this is not surprising given her grandmother's shock, uncertainty regarding whether to ask any questions, and understandable desire to calm her granddaughter, as compared with an unrelated CPS worker trained to carefully work with children in such situations. Moreover, L.D.'s initial statement and her subsequent, strikingly similar statements to CPS workers were not rendered automatically unreliable merely because the last incident of molestation occurred a couple months before the then-seven-year-old child finally broke down and confided in someone. Further, L.D.'s consistent statements do not become somehow less trustworthy simply because it took a couple months for a proper investigation to proceed in the correct county. Considering these particular circumstances, we cannot say the court abused its discretion when it determined that certain limited[4] hearsay was sufficiently reliable under the Protected Person Statute to be allowed into evidence.[5] It was then up to the jury to determine the weight of L.D.'s testimony and the other evidence presented.

III. Final Instruction #7

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[4] In addition, we point out that the court was careful not to permit the drumbeat repetition of the allegations.

[5] In reaching our conclusion, we distinguish the two main cases cited by McCullough. *See Pierce v. State*, 677 N.E.2d 39 (Ind. 1997) (holding that videotaped interview was not sufficiently reliable to be admissible under Protected Person Statute where mother was present during interview with three-year-old child victim, had suggested answers, and had asked leading questions; further, child was incompetent to testify because she did not understand the nature and obligation of an oath); *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003) (finding videotaped statements inadmissible as unreliable where there was no indication that victim's statements were made close in time to the alleged molestations, the statements themselves were not sufficiently close in time to each other to prevent implantation or cleansing, and victim was unable to distinguish truth and falsehood and thus was unavailable).

On appeal here, McCullough challenges Final Instruction #7, which reads: "Proof of the slightest penetration is sufficient to sustain a conviction for child molesting based upon penetration of the female sex organ or anus by the male organ or object." App. at 391. He points out that this is actually an appellate standard of review for sufficiency challenges in child molest cases, and he alleges that it unfairly emphasizes a single piece of evidence. McCullough also asserts that Final Instruction #7 is confusing and may have been interpreted by jurors to mean that they must believe L.D.'s version of events. *See* Appellant's Br. at 34.

Ordinarily, when presented with an instructional challenge, we recite the familiar abuse of discretion standard as well as other pertinent rules. *See Snell v. State*, 866 N.E.2d 392, 395 (Ind. Ct. App. 2007); *Stringer v. State*, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006) (noting jury instructions are to be considered as a whole and in reference to each other); *Hubbard v. State*, 742 N.E.2d 919, 921 (Ind. 2001) (noting the court considers whether the instruction is a correct statement of law, whether there is evidence to support it, and whether the substance of the instruction is covered by other instructions given); *Dill v. State*, 741 N.E.2d 1230, 1232 (Ind. 2001) (noting the purpose of a jury instruction is to inform the jury of the laws applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict). However, because McCullough neither objected at trial to Final Instruction #7 nor offered alternative instructions, fundamental error must be shown to avoid waiver. *See Sanchez v. State*, 675 N.E.2d 306, 308 (Ind. 1996).

"Fundamental error is error that represents a blatant violation of basic principles

rendering the trial unfair to the defendant and, thereby, depriving the defendant of fundamental due process." *See Borders v. State*, 688 N.E.2d 874, 882 (Ind. 1997). The error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. *Id.* "In determining whether a claimed error denies the defendant a fair trial, we consider whether the resulting harm or potential for harm is substantial." *Townsend v. State*, 632 N.E.2d 727, 730 (Ind. 1994). "The element of harm is not shown by the fact that a defendant was ultimately convicted; rather, it depends upon whether his right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he otherwise would have been entitled." *Id*.

In addition to hearing Final Instruction #7, the jurors heard Preliminary Instruction #3, which provides: "Under the Constitution of Indiana the jury has the right to determine both the law and the facts. The Court's instructions are your best source in determining the law." App. at 350. The court also read the following instruction:

> The crime of child molesting is defined by statute as follows:
>
> A person who, with a child under fourteen (14) years of age, performs or submits to deviate sexual conduct, commits child molesting, a Class B felony. However, the offense is a Class A felony if it is committed by a person at least twenty-one (21) years of age.
>
> To convict the Defendant, the State must prove each of the following elements:
>
> 1. the defendant, Ian McCullough,
> 2. did knowingly,
> 3. perform or submit to deviate sexual conduct, an act involving the sex organ of [L.D.] and the mouth of Ian McCullough,
> 4. when [L.D.] was then under the age of fourteen (14) years of age, that is: seven (7) years of age,
> 5. when Ian McCullough was at least twenty-one (21) years of age.
>
> If the State fails to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child molesting, a Class A

> felony, as charged in Count I.
>
> If the State does prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of child molesting, a Class A felony, as charged in Count I.

Id. at 356. Furthermore, the jury was instructed that a person charged with a crime is presumed innocent, and that the State must prove the defendant guilty of each element of the crime charged, beyond a reasonable doubt. *Id.* at 362 (Instruction #13). The jury received significant instruction on reasonable doubt as well. *Id*. at 363 (Instruction #14).

In *Surber v. State*, 884 N.E.2d 856, 866-68 (Ind. Ct. App. 2008), *trans. denied*, the defendant objected to the instruction: "[a]ny sexual penetration, however slight, may be sufficient to complete the crime of child molestation." In affirming Surber's conviction, we stated, "[e]ven assuming that it would have been more appropriate to include the phrase, 'if the other elements are proved,' in the instruction, we cannot say that reversible error occurred." *Id*. at 867. Similarly, we conclude here that the instructions as a whole did not confuse the jurors as to the elements of child molesting, nor were the jurors misled to weigh L.D.'s testimony more heavily than McCullough's. In short, we cannot say that Final Instruction #7 constituted fundamental error in light of the other instructions that were read.

IV. Prosecutorial Misconduct

On appeal, McCullough contends that the prosecutor committed misconduct that placed him in grave peril when, during closing argument, the attorney for the State repeatedly asked if the jury was going to let McCullough "walk." Appellant's Br. at 36. McCullough maintains that the prosecutor's approach was to frighten the jurors into finding him guilty, thus destroying the presumption of innocence and implying that the defense attorney was

attempting to free his client by zeroing in on insignificant facts. At trial, McCullough did not object to the State's closing argument.

When reviewing a charge of prosecutorial misconduct, first, we consider whether the prosecutor engaged in misconduct; second, we consider all the circumstances of the case to determine whether such misconduct placed the defendant in a position of grave peril to which he should not have been subjected. *Ratliff v. State*, 741 N.E.2d 424, 428-29 (Ind. Ct. App. 2000), *trans. denied*. The latter is measured not by the degree of impropriety of the misconduct, but by the probable persuasive effect of the misconduct on the factfinder's decision and whether there were repeated examples of misconduct that would evince a deliberate attempt to unfairly prejudice the defendant. *Lampitok v. State*, 817 N.E.2d 630, 637 (Ind. Ct. App. 2004), *trans. denied*.

A party's failure to present a contemporaneous trial objection asserting prosecutorial misconduct precludes appellate review of the claim. *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002). However, such default may be avoided if the prosecutorial misconduct amounts to fundamental error. *Id*. To constitute fundamental error, the prosecutorial misconduct must make a fair disposition impossible or constitute clearly blatant violations of basic and elementary principles of due process and present an undeniable and substantial potential for harm. *Nevel v. State*, 818 N.E.2d 1, 5 (Ind. Ct. App. 2004).

The State's closing argument contained no reference to allowing McCullough to "walk." *See* Tr. at 777-83. Rather, the prosecutor focused on the elements required to demonstrate that McCullough had committed the charged crimes and the facts that she

believed proved those elements. *Id*. at 779 (stating that the "State is charged with proving to you each element of the offense" and outlining the elements and supporting circumstances). Thereafter, the defense made its closing statement, during which counsel argued that McCullough had not committed the charged acts, challenged the truthfulness of the State's witnesses, and pointed out inconsistencies in the testimony. On rebuttal, the State responded as follows:

> Ladies and gentlemen, so let me get this straight. We're going to walk him because she used you-know-what in the video, and she used private on the stand. So we walk him for that, right? Because that's such a big inconsistency that a child would use two different words for her vagina. We walk him because of that? Oh, and let me get this straight. She, she, there's no way that she's going to know that it happened in the car, she had no situational context for that because she testified that it happened in the bedroom, in his bed, when she was sleeping with him. So we walk him because of that, too? Well, the State would submit to you that, yes, she did have every reason to believe that it would happen in the car. He took every advantage that he had alone with this child to put his fingers in her vagina, and you know why? Because he's an equal opportunity child molester. That's what he is. Equal opportunity. Opportunity in the bedroom and opportunity in the car does not mean reasonable doubt. California, I wish I could charge it, but that's not my jurisdiction. I wish I could charge in California what he did to her, what she testified that he did to her, what she told Diane Bowers that he did to her. You want to throw mom under the bus? Throw mom under the bus, but do not discredit the testimony of this nine year old child who came in here and told fourteen strangers what happened to her. Do not discredit that and walk this man because of it. She's a child. She is consistent, ladies and gentlemen.

Id. at 801-02. The State went on to discuss reasonable doubt, attempted to explain any problems with L.D.'s testimony, and noted it was not surprised that McCullough denied having committed the charges. *Id.* at 803-04.

If accusing the defense of attempting to get McCullough off on a technicality had been the State's theory/theme, presumably the prosecutor would have highlighted it or at least

mentioned it during her original closing statement. The prosecutor did neither. Again, the State's first mention of permitting McCullough to "walk" did not occur until *after* the defense's closing statement, and then only in response to the defense's attempts to discredit the State's witnesses. We reiterate that the State's focus was on showing the jurors how it had met its burden of proving beyond a reasonable doubt that McCullough had committed the crimes. Viewed in context, the references to "walking," while not to be encouraged, did not make a fair disposition impossible, constitute clearly blatant violations of basic and elementary principles of due process, or present an undeniable and substantial potential for harm. Thus, McCullough has not shown fundamental error.

Affirmed.

ROBB, J., and BROWN, J., concur.